BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH

IN THE MATTER OF THE REQUEST FOR AGENCY ACTION OF EP ENERGY E&P COMPANY, L.P. FOR AN ORDER POOLING ALL INTERESTS, INCLUDING THE COMPULSORY POOLING OF THE INTERESTS OF ARGO ENERGY PARTNERS, LTD., DUSTY SANDERSON, HUNT OIL COMPANY, KKREP, LLC, AND J.P. FURLONG CO., IN THE DRILLING UNIT ESTABLISHED FOR THE PRODUCTION OF OIL, GAS AND ASSOCIATED HYDROCARBONS FROM THE LOWER GREEN RIVER-WASATCH FORMATIONS COMPRISED OF ALL OF SECTION 2, TOWNSHIP 3 SOUTH, RANGE 5 WEST, U.S.M., DUCHESNE COUNTY, UTAH	**MOTION FOR RECONSIDERATION OF MINUTE ENTRY** Docket No. 2015-013 Cause No. 139-130

EP Energy E&P Company, L.P. ("EPE"), acting by and through its attorneys, MacDonald & Miller Mineral Legal Services, PLLC, and pursuant to Utah Admin. Code Rule R641-110-100 and 200, hereby respectfully requests that the Board of Oil, Gas and Mining (the "Board") reconsider that portion of its Minute Entry filed in this Cause on May 11, 2015 ("Minute Entry") finding and declaring J.P. Furlong Co. ("Furlong") to be a "consenting" party as defined in Utah Code Ann. §40-6-2(11). Although the Minute Entry is not deemed a "final order" and Rules R641-100 and 200 contemplate a "petition for rehearing" after the signing of a "final order," EPE nevertheless believes it is in the interest of judicial efficiency to have the Board address the matters outlined below at this

juncture for clarification prior to preparation and submission of a final order. To the extent otherwise required under the Board's rules, this Motion should alternatively be considered as a Motion for Leave to Deviate from Board Rules to allow such reconsideration pursuant to Utah Admin. Code Rule R641-100-400.

Specifically, EPE desires reconsideration/clarification concerning the Board's findings that Furlong's execution of the Authorization for Expenditure ("AFE"), combined with its "tender" of its share of the drilling and completion expenses for the Neihart 2-2C5 Well, support the conclusion that Furlong is a "consenting owner." In the Minute Entry, the Board states, with respect to and applying to Furlong the second alternate criteria under the statutory definition of "nonconsenting owner" (Utah Code Ann. §40-6-2(11)), as follows:

> Regarding the second of these two elements, the Board finds under the circumstances of this case that Furlong, ***in signing the Authority for Expenditure and tendering its share of the drilling and completion expenses***, agreed to bear its proportionate share of costs.

(Minute Entry, Page 2, last paragraph) (emphasis added). In addition, the Board also states:

> Reasonable arguments can be made about whether Furlong consented to the drilling *and operation* of the well ***after it signed the AFE, tendered its share of drilling and completion costs***, but failed to sign the JOA prepared by EPE. This question, under these particular facts, is a matter of first impression. The Board, under the circumstances of this case, finds that Furlong did sufficiently consent. Some of the factors the Board considered were:

- ***Furlong signed the AFE and tendered its money in accordance with the AFE***, which in some measure is implied consent to operation of the well going forward …

(Minute Entry, Page 3, last paragraph) (bolded emphasis added). It appears to EPE that the Board placed great weight on the fact that Furlong signed the AFE and "tendered" the AFE'd amount in concluding Furlong was a "consenting" party. EPE respectfully submits the Board misplaced that emphasis, especially in light of issues under first impression.

The evidence clearly reflects that the referenced "tender" was not made until at least April 2, 2015, nearly five (5) months after the Conditional Offer to Participate and AFE were first presented to Furlong and, most importantly, ***after*** the filing and service of the Request for Agency Action in the Cause. While Mr. Furlong testified that the AFE'd costs were "paid" (Hearing Transcript, Pg. 147, Lines 17-23), he also stated, "I didn't know the well had been drilled and completed by the time I elected to that well." (Hearing Transcript, Pg. 148, Lines 6 and 7). Mr. Furlong never testified about a date or timeframe when said "payment" was made. However, as evidenced by EPE's Exhibit "M" and Rebuttal Exhibit "7" admitted into evidence, Furlong was clearly made aware, in the Conditional Offers to Participate sent by EPE to Hunt on November 10, 2014, and to Furlong directly on December 16, 2014, that the Well had spud back in August 2014. In addition, Mr. DeWitt of EPE clearly and unequivocally testified that Furlong never requested any information about the Well and, most importantly, that no

payment of the AFE'd costs was even ***tendered*** by Furlong to EPE prior to the filing of the Request for Agency Action (Transcript, Pg. 32, Lines 19-25). Most compelling is Furlong's counsel's own admission that Furlong did not mail any payment until April 2, 2015[1], confirming and supporting Mr. DeWitt's testimony. [Furlong's] Reply to Memorandum [in Opposition to Continuance] filed April 13, 2015, ¶ 3. This is critical factual evidence supporting why Furlong should instead be deemed a "nonconsenting owner."

To the point, no payment was tendered by Furlong until EPE took action and filed the Request for Agency Action. The Minute Entry currently indicates that a non-operator may simply sign an AFE and sit back without tendering any payment thereon until a Request for Agency Action is filed. That is little too little, little too late, and surely cannot and should not be the Board's intent. For the reasons outlined below, the mere signing of an AFE without a joint operating agreement ("JOA"), and at least without a concurrent or timely associated tender of the AFE'd amount, cannot suffice as "consent" because it leaves an operator no remedy to collect the payment except through the filing of a compulsory pooling action. As such, the Board's ruling that a tender after the filing of such a request for agency action results in an operator having to undertake the time and expense of such a filing without any negative consequences to the non-operator (since it

[1] EPE received the payment on April 10, 2015, but rejected it pending the Board's ruling in this Cause.

will be deemed a "consenting owner" simply by signing an AFE and then waiting to tender the AFE'd amount after such filing). Such a tender must be deemed untimely.

The AFE is nothing more than an ***estimate*** of costs; it is ***not*** a binding legal contract. Although there is no Utah case law addressing the legal effect of an AFE, in *Sonat Exploration Co. v. Mann*, 785 F.2d 1232 (5th Cir. 1986), the issue squarely before the court was the legal effect of an AFE signed by a non-operator who was not a signatory to the JOA, similar to Furlong. The court stated:

> Our research discloses no authority for the proposition that an AFE is enforceable against one who has not signed an accompanying operating agreement. We find no case in which the signer of an AFE has been held liable solely because of the execution of the AFE. We find no secondary authority espousing such a result.

Id., at 1234. See also *Mariner Energy, Inc. v. Devon Energy Prod. Co.*, 690 F. Supp. 2d, 550, 575 (S.D. Tx. 2010). The *Sonat* court further stated:

> Sonat's vice president stated Sonat generally tried to make all working interest owners parties to the operating agreement. This suggests the imperative of the operating agreement. An expert's testimony lent support to the argument that an AFE is only binding if appended to an operating agreement. We have come to that conclusion after reviewing the few cases involving AFEs and literature on the subject.

Sonat, at 1235. As a consequence, the court held the non-operator was not legally bound to pay the AFE'd amount. If Furlong was not legally bound by the AFE to pay, how can it be deemed to have "consented" to pay its share of the drilling and operation of the Neihart 2-2C5 Well absent an accompanying JOA or tendering the payment at that time?

What is clear from the *Sonat* case is that it is the ***JOA*** that provides the contractual obligation to pay an AFE, not the AFE alone. A standard AAPL Form 610 JOA - 1989 provides numerous remedies to insure timely payment of an AFE signed by a non-operator party to the JOA. For example, the operator can then deem the non-operator as a non-consenting party or enforce the lien or security interest granted by the non-operator to secure such payment, among other remedies (*see* generally Articles VII.B and D). However, without a JOA, in Utah, the operator's only way to insure payment will be made by a non-operator refusing to sign a JOA is to bring a compulsory pooling action. Given that, there must be a requirement that such a non-operator must not only sign an AFE, but also concurrently or timely tender its AFE'd costs to be a "consenting owner" under Utah's compulsory pooling statute. This is ***exactly*** why EPE conditioned the AFE and the offer to participate to Furlong on the execution of the JOA.

EPE acknowledges that the AFE Furlong signed does provide:

> This authorization for expenditure (AFE) constitutes a contract between the non-operator signing the AFE and the operator whereby the non-operator hereby promises and agrees to pay operator within thirty (30) days after billing, its proportionate share of all reasonable expenditures on the described operations until such time as an operating agreement is executed.

See EPE's Exhibit "N" admitted into evidence. However, as noted repeatedly, that same AFE was ***expressly made conditioned*** upon the concurrent execution of the JOA. Without that condition being satisfied, no "contract" ever existed between Furlong and

EPE, notwithstanding the quoted language, as there was no agreement or "meeting of the minds" between EPE and Furlong. Further, without the concurrent or timely associated tender of the AFE'd costs, there was no consideration given by Furlong for any "contract" to become effective. Since, as discussed above, the AFE is not binding upon the signatory without an associated operating agreement, there is no other consideration but monetary that would suffice. It is well established in Utah that the "formation of a contract requires an offer, an acceptance and ***consideration***." *Cea v. Hoffman*, 276 P.3d 1178, 1185 (Ut. Ct. Ap. 2012) (citation omitted) (emphasis added).

For these reasons, EPE respectfully submits the Board should reconsider its ruling that Furlong is a "consenting owner." A JOA and the timing of the tendering of AFE'd costs must be accounted for in the election to participate if the Board is going to rely on a signed AFE as reflecting consent. If the Board should reconsider and so change its Minute Entry ruling to declare Furlong a "nonconsenting owner," it would then also need to determine the applicable risk compensation amount to impose on Furlong. If it should deny reconsideration, at least then its ruling would be clarified so that an appropriate final and applicable order can be prepared and entered. Either way, judicial economy results.

Respectfully submitted this 18th day of May, 2015.

MACDONALD & MILLER
MINERAL LEGAL SERVICES, PLLC

By: _____
Frederick M. MacDonald, Esq.

Attorneys for EP Energy E&P Company, L.P.

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of May, 2015, I caused a true and correct copy of the foregoing Motion for Reconsideration of Minute Entry, to be sent electronically (where e-mail addresses are indicated) and/or mailed, postage pre-paid, to the following:

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